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In The

# Supreme Court of the United States

CITY OF ELDON, MISSOURI
RON BLY, STEVE WOOD, BRAD VEATCH, and
SCOTT HARRISON,

*Petitioners,*

v.

LAVERNE BELK,

*Respondent.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

RESPONDENT'S BRIEF IN OPPOSITION..... 1

REASONS FOR DENYING THE PETITION..... 1

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT CONTRADICT THIS COURT'S RULING IN *CONNICK* IN THAT THE COURT CONSIDERED ALL OF THE EVIDENCE PRESENTED BY THE EMPLOYER AND FOUND THAT THE EMPLOYER COULD NOT SATISFY ITS BURDEN UNDER THE PICKERING BALANCING ANALYSIS AND, THUS, AN IN-DEPTH DISCUSSION OF THAT ANALYSIS WAS UNNECESSARY ..... 2

II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT MISAPPLY *CONNICK* AND THE CLAIM THAT THE DECISION HAS AN IMPACT UPON HOW FIRST AMENDMENT RETALIATION CASES ARE ANALYZED IS WITHOUT MERIT..... 5

A. The Eighth Circuit correctly upheld the District Court's decision in refusing to submit particular special interrogatories to the jury ..... 5

B. The Eighth Circuit Court reviewed all of the evidence under the proper standard of review and did not fail to consider the full context of the dispute which motivated the Board's decision..... 8

C. The Eighth Circuit Court did not misconstrue this Court's decision in ***Harlow v. Fitzgerald*** in its ruling on the individual Petitioners' claims of qualified immunity .. 10

CONCLUSION ..... 12

# TABLE OF AUTHORITIES

Page

CASES

*Carey v. Brown*, 447 U.S. 455 (1980) ..... 8

*Connick v. Myers*, 461 U.S. 138 (1983) ..... *passim*

*Garrison v. Louisiana*, 379 U.S. 64 (1964) ..... 7

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... 10

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) ..... 8

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ..... 7

*Pickering v. Board of Education*, 391 U.S. 563 (1968) ..... *passim*

*Waters v. Churchill*, 511 U.S. 661 (1994) ..... 4, 6, 7

CONSTITUTIONS

U.S. Const. Amend. I ..... *passim*

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Laverne Belk, respectfully requests that the court deny the Petition for Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the Eighth Circuit Court of Appeals.

## REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari for the following reasons: 1) the Eighth Circuit Court of Appeals correctly analyzed the issue of whether the employee's First Amendment rights outweighed the governmental employer's need for efficiency and harmony within the workplace and there is no conflict between the decision and ***Connick v. Myers,*** 461 U.S. 138 (1983); 2) the special interrogatories presented to the jury did not prevent the jury from deciding all necessary fact issues; and 3) the Court properly ruled that the individual defendants were not entitled to qualified immunity in light of the fact that none of them presented any evidence that the employee's First Amendment expression caused any disruption within the workplace, thereby obviating any real need for an in-depth analysis under ***Pickering v. Board of Education,*** 391 U.S. 563 (1968).

## I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT CONTRADICT THIS COURT'S RULING IN *CONNICK* IN THAT THE COURT CONSIDERED ALL OF THE EVIDENCE PRESENTED BY THE EMPLOYER AND FOUND THAT THE EMPLOYER COULD NOT SATISFY ITS BURDEN UNDER THE *PICKERING* BALANCING ANALYSIS AND, THUS, AN IN-DEPTH DISCUSSION OF THAT ANALYSIS WAS UNNECESSARY.

Petitioners assert that the Eighth Circuit Court of Appeals departed from this Court's decision in ***Connick*** by holding that the ***Pickering*** analysis was completely inapplicable unless the governmental employer first demonstrated actual workplace disruption caused by the employee's First Amendment expression. Petitioners' characterization of the court's ruling is not accurate.

The Eighth Circuit Court of Appeals, after having found that Respondent's speech touched upon a matter of public concern, then discussed whether the government's actions in terminating Respondent were improper, utilizing the ***Pickering*** balancing analysis. ***Belk v. City of Eldon,*** Pet.App.10a[1]. In so doing, the Court set forth the following interrelated six factors which have developed from ***Pickering*** and its progeny: "(1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working

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[1] Citation to "Pet.App." references the appendix to Petitioners' petition for writ of certiorari. For convenience, all page citations to the decision under review refer to the copy reproduced by Petitioners in the appendix to their petition, not to the pages of the reported opinion.

relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties." ***Belk,*** Pet.App.10a.

The Court then held that, in those few cases in which an employer cannot demonstrate that the employee's speech caused any actual disruption within the work-place, "[t]he court need not proceed to a specific ***Pickering*** factor analysis absent exceptional circumstances." ***Belk,*** Pet.App.11a. In other words, the Court was merely stating that, if it is clear that the government's evidence of work place disruption is weak and the employee's evidence demonstrates that there was substantial public interest in the employee's speech, which was expressed in a manner, time and place designed to minimize the work place disruption, the need for a discussion of each specific factor under the ***Pickering*** balancing test is obviated.

This Court, in both ***Pickering*** and ***Connick,*** wisely recognized that there can be no bright-line test to determine whether the government's interests outweigh the employee's interest in First Amendment retaliation cases. In ***Pickering,*** this Court stated, "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." ***Pickering,*** 391 U.S. at 569. The

Court reiterated that comment in ***Connick***, and further stated, "[t]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." ***Connick***, 461 U.S. at 150.

The Eighth Circuit did not ignore or refuse to analyze this case under the recognized balancing test. Rather, the Court merely stated that, when the employer has failed to make a strong showing on the relevant factors, there is no need to address each specific factor individually in the analysis.

Petitioners further contend that the Eight Circuit Court's decision directly contradicts this Court's ruling in ***Waters v. Churchill***, 511 U.S. 661 (1994). In ***Waters***, this Court noted that because of their unique positions, public employees would need First Amendment protection in order that they might speak out about their knowledge of problems besetting the particular agencies for which they work. ***Waters***, 511 U.S. at 674. In those situations, this Court stated that, "the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." ***Id.*** Because this Court recognized that, in certain situations the need for First Amendment protection is greater and requires more of the employer, the Eighth Circuit Court's decision in this case does not contradict the holding of ***Waters***. The Eighth Circuit Court analyzed the evidence presented by the Petitioners and found that, as a matter of law, the evidence would not weigh in their favor under the ***Pickering*** balancing test.

## II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT MISAPPLY *CONNICK* AND THE CLAIM THAT THE DECISION HAS AN IMPACT UPON HOW FIRST AMENDMENT RETALIATION CASES ARE ANALYZED IS WITHOUT MERIT.

Petitioners contend that the decision in this case follows from an entire line of cases which created a direct conflict with *Connick*. The cases cited by Petitioners, however, do not create such a conflict and Petitioners are exaggerating the alleged impact of these cases upon First Amendment retaliation cases. Furthermore, Petitioners seem to ignore the fact that the district court set out an in-depth *Pickering* analysis of Respondent's First Amendment claim and affirmed the jury's verdict in favor of Respondent. Thus, Petitioners have not been deprived of a full, in-depth *Pickering* analysis. The Eighth Circuit Court of Appeals had the benefit of the district court's full analysis and, after reviewing the evidence, recognized that another in-depth, factor-by-factor analysis was unnecessary, in light of the weakness of Petitioners' evidence.

### A. The Eighth Circuit correctly upheld the District Court's decision in refusing to submit particular special interrogatories to the jury.

Petitioners state that they are not challenging the District Court's broad discretion in submitting jury instructions. Yet, that is exactly what they are doing. Petitioners do not point to any cases, in the Eighth Circuit or any other circuit, which hold that the District Court is required to submit special interrogatories to the jury. In

this case, the District Court submitted five special interrogatories to the jury. Pet.App.44a-45a.

As the Eighth Circuit properly recognized, the District Court has broad discretion in ruling upon proffered jury instructions. Petitioners argue to this Court that the District Court's failure to submit more than the five special interrogatories was so prejudicial that the decision to affirm the District Court's ruling should be reversed. This argument, however, ignores that the determination as to whether speech is protected is a question of law, not fact. *Connick*, 461 U.S. at 148, n.7.

Petitioners contend that the error occurred when the District Court did not submit certain special interrogatories to the jury and that, this failure somehow established a departure from other cases involving the *Pickering* analysis, that this Court should reverse the decision. Throughout their petition, Petitioners argue that the Eighth Circuit's decision contradicts this Court's decisions in *Connick* and *Waters* and that certiorari should be granted to address this glaring contradiction. The most significant obstacle for Petitioners, in making this argument, is that this Court has never held that there are certain interrogatories which must be submitted to a jury in a First Amendment retaliation case. In fact, to do so would be a dramatic departure from this Court's previous recognition that there can be no general standard by which First Amendment retaliation cases are analyzed. In *Pickering*, this Court stated: "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a

general standard against which all such statements may be judged." *Pickering,* 391 U.S. at 569. This Court reiterated this statement in *Connick.* Again, in *Waters* this Court recognized that there are no general tests "[t]o determine when a procedural safeguard is required by the First Amendment . . . what constitutes a compelling state interest . . . what categories of speech are so lacking in value that they fall outside the protection of the First Amendment . . . or many other matters. . . . " *Waters,* 511 U.S. at 671 (citations omitted).

Petitioners contend that this Court's suggestion in *Waters,* that the jury decide fact questions relevant to the *Pickering* analysis, be expanded to a pronouncement from this Court regarding specific jury instructions for all cases involving a First Amendment retaliation claim. This contention is unreasonable, if not outrageous. Petitioners' argument suggests that the judiciary cannot discern which fact issues should be submitted to a jury in a First Amendment case. Respondent trusts that this Court's earlier rulings in First Amendment cases will continue to guide the lower courts to properly submit questions of fact to the jury and the Eighth Circuit Court's ruling does not jeopardize such guidance.

This Court has previously noted that the First Amendment declares the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Similarly, the Court recognized that "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, this Court has consistently held that

when an individual speaks on matters involving a public concern, that speech occupies the "highest rung of the hierarchy of First Amendment values," and is "entitled to special protection." ***NAACP v. Claiborne Hardware Co.,*** 458 U.S. 886, 913 (1982); ***Carey v. Brown,*** 447 U.S. 455, 467 (1980).

This Court should not abandon these principles of protecting speech concerning matters of vital interest to the public simply to create a general test regarding what fact questions should be submitted to a jury so that litigation can be simplified for the parties. Unlike Petitioners, Respondent has confidence in our judiciary to utilize the broad discretion afforded to them to consider each individual case and formulate special interrogatories which fairly and adequately present the fact issues to the jury and leave the question of law for the court's determination. The Eighth Circuit Court's decision in this case does not erode the ***Pickering*** test and should not alarm this Court, as Petitioners suggest.

### B. The Eighth Circuit Court reviewed all of the evidence under the proper standard of review and did not fail to consider the full context of the dispute which motivated the Board's decision.

In this portion of their petition, Petitioners focus primarily upon the Eighth Circuit Court's limited review of Respondent's freedom of association claim. Petitioners argue that Respondent's activities with a group of citizens, known as the Eldon Concerned Citizens, were such

that the Court's failure to more fully consider those activities was prejudicial. There are several reasons why Petitioners' argument is without merit.

Respondent presented two theories at trial as to how her First Amendment rights were violated by Petitioners. Respondent's primary claim was that she was discharged for speaking privately to a member of the Board of Aldermen about her concerns that the City Administrator was improperly allowing an employee to receive benefits to which she was not entitled. The Court correctly held that, since Respondent's speech involved the improper use of public funds, her speech was protected by the First Amendment. Pet.App.9a-10a. The Court then went on to hold that the government's interest did not outweigh Respondent's interest, inasmuch as the city made very little, if any, showing that Respondent's speech disrupted the operations of the city. Pet.App.12a-13a. Because the Court found that Petitioners violated Respondent's First Amendment rights by terminating her for her conversation with Alderman Dolby, then the need to further analyze Respondent's freedom of association claim does not exist as a violation of Respondent's constitutional rights has already been found.

In addition, the freedom of association claim is not as critical as Petitioners would have this Court believe because the jury found, in answering the special interrogatories, that Respondent's attendance at the meetings of the Eldon Concerned Citizens did not impede the efficient operations of the city, that Respondent did not speak at any of the meetings, except to answer questions directed to her and that the city failed to prove that Respondent was critical of the city administration at the

meetings of the Eldon Concerned Citizens. Pet.App. 44a-45a.

The evidence at trial was that the president of the Eldon Concerned Citizens asked Respondent and several members of the Board of Aldermen to attend meetings of the citizens' group. A.1.a.[2] Petitioners would lead this Court to believe that Respondent was integral to the formation of this group. The testimony at trial clearly showed, and the jury properly found, that Respondent did nothing more than answer a few questions about how to form a group A.2.a. The Eighth Circuit Court did not depart from this Court's prior decisions in either ***Connick*** or ***Waters*** by not considering the freedom of association claim in greater detail.

### C. The Eighth Circuit Court did not misconstrue this Court's decision in *Harlow v. Fitzgerald* in its ruling on the individual Petitioners' claims of qualified immunity.

Respondent does not challenge Petitioners' statements that this Court has previously ruled that "government officials performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald,*** 457 U.S. 800, 817-18 (1982). In this case, however, Respondent's First Amendment rights were clearly established and a reasonable

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[2] Citation to "A" references the appendix located at the end of this Brief in Opposition to Petition for Writ of Certiorari.

person would have known that, under the circumstances of this case, that discharging Respondent for exercising those rights would be unconstitutional.

In this portion of their argument, Petitioners raise the same argument they made to the Eighth Circuit Court – namely that because the investigating attorney found reasons to discharge Respondent that the individual members of the Board of Aldermen should be entitled to qualified immunity. Petitioners ignore a crucial fact when making this argument. The Eighth Circuit Court, however, did not overlook this fact and neither should this Court.

The crucial fact which Petitioners do not point out to this Court is that the investigating attorney testified that he was not aware of Respondent's conversation with Alderman Dolby in which she spoke about the city administrator's improper use of public funds. A.3.a-7.a. Thus, the investigating attorney did not have knowledge of the First Amendment claim which could be raised by Respondent should she be discharged. Without this crucial information, his recommendation to the Board of Aldermen cannot be used to shield the individual members of the Board from liability.

The Eighth Circuit further held that, in light of the employer's failure to produce any evidence that Respondent's speech impeded the operations of the city, then the individual members of the Board are not entitled to qualified immunity. Pet.App.14a. In other words, if the balancing to be done under the ***Pickering*** test is not difficult because of the lack of evidence weighing in the

employer's favor and the individual officials then discharge the employee for exercising her right to speak out on matters of public concern, those individuals are not entitled to qualified immunity. The Eighth Circuit Court's opinion in this case does not depart from this Court's prior holdings in other cases and the petition for certiorari should be denied.

## CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

| | |
|---|---|
| LAVERNE BELK, Plaintiff, v. CITY OF ELDON, et al., Defendants. | Case No. 97-4174-CV-C-5<br>Jefferson City, Missouri<br>November 19, 1998 |

## VOLUME II & III
## TRANSCRIPT OF TRIAL
## BEFORE THE HONORABLE NANETTE K. LAUGHREY
## UNITED STATES DISTRICT JUDGE and a JURY

[II-320] Jones – Direct

* * *

A. I was on the council when we hired him.

Q. Okay. Are you also familiar with a group known as the Eldon Concerned Citizens Committee?

A. Yes.

Q. How do you know about that group?

A. I was one of them that formed it.

Q. Okay. Who all formed that group?

A. There was about, I'd say, ten to 15 people, and then it expanded into about 60.

Q. Okay. Was Laverne Belk a member of the organizing group?

A. No.

Q. Okay. Did you invite individuals who were aldermen and city employees to attend meetings of the Eldon –

A. Yes, I did.

Q. Okay. Who specifically did you invite?

A. We invited all the aldermens to attend.

Q. Did any of them attend the meetings?

A. Yes, they did.

Q. Who attended the meetings?

A. Ron Bly attended, and Steve Wood attended that I know of.

Q. Did you invite anyone else?

A. We invited Laverne Belk to the second meeting.

Q. Okay. And did she attend?

A. Yes, she did.

Q. What did you tell Laverne was going to happen at the [II-321] meeting?

A. We needed some advice. We had several people that was very unhappy with the City. And we needed to see how to form it. You know, like a president, vice president, and she give us the procedures.

Q. Okay.

A. And then she left.

Q. Okay. She just told you procedurally how to organize –

A. Yes.

Q. – yourself?

A. Yes.

Q. And that's it?

A. Yes.

Q. Did she ever suggest any agenda for the group?

A. Well, she told us how to do an agenda.

Q. Okay. But did she tell you what should be the agenda?

A. No.

Q. Okay. Were the aldermen asked questions at this meeting?

A. Yes, they were.

Q. Did they answer those questions?

A. Most of the time they did.

Q. Was Laverne ever elected as an officer?

A. No.

Q. Why did you and the others start this group?

A. Well, we were quite concerned what was going on in the

* * *



obtain from them what they thought would be appropriate for me to know based on why I was there.

Q. And so you don't recall necessarily how long you spent with any one particular employee?

A. No. I spent the time that I felt was adequate for me to find out the facts upon which I could make recommendations and for the – for those people I met with to provide me with the information they wanted me to have.

Q. Okay. Did you interview Laverne Belk?

A. Yes.

Q. Okay. Did she – during the interview did she indicate to you that she had had a conversation with Harold Dolby regarding allegations that she had about Mr. Link?

A. I don't remember specifics today in terms of what was told to me or not told to me. What I turned into the City as a report is the – are the facts that I felt were appropriate to make any recommendation.

Q. Okay. So, you don't recall that or not?

A. Today I don't recall that conversation. It may have occurred. I don't know.

Q. Okay. Do you recall that I took your deposition earlier in this matter?

A. Yes.

Q. And do you recall me asking you that particular question at deposition –

[III-468] A. No.

Q. – as to whether Laverne had told you about her statements to Harold Dolby?

A. I don't have any independent recollection today.

Q. Okay. Were you aware that there was some investigation conducted about allegations that Ms. Belk had made about Mr. Link?

A. I don't have any independent recollection today of details like that. Part of the reason I was brought in is that there was some allegations concerning the conduct of the City Administrator involving sexual harassment.

Q. Okay. And do you recall if that was in reference to any one specific employee?

A. Yes, I do.

Q. And do you remember the name of that employee?

A. The last name comes to mind, I believe, was Carpenter.

Q. I need to clarify my question with you again. When you say you don't recall if Laverne told you about a statement she made to Harold Dolby, are you saying that it's your recollection that that did not recall or you aren't recalling whether it was or not?

A. I don't recall the specific conversations I had with people during the investigations at this point in time. And as to the second question related to it, I don't recall you asking me that question.

[III-469] Q. Okay. With respect to your investigation, did you become aware that Laverne Belk had been removed from her position as Assistant City Administrator, or at least had had supervisory authority taken from her by Mr. Link?

A. Mr. Link had adjusted Ms. Belk's position during the period of time in which he was City Administrator. I don't remember the specific positions to which her title was changed, but I do know that he did adjust her job duties and responsibilities while he was City Administrator prior to the time I conducted the investigation.

Q. Okay. Do you recall whether you received any information as to whether a few weeks prior to that action being taken, whether Ms. Belk had had her conversation with Mr. Dolby?

A. I don't recall that information at all.

Q. Okay.

A. The conversation that you keep referring to with Mr. Dolby, I don't have any recall of that.

Q. Okay. And you have conduct – you've testified you've conducted a number of investigations –

A. Yes.

Q. – such as this, right?

A. Yes.

Q. Would it have been of concern to you in your investigation in this particular matter if you had known that prior to – just a few weeks prior to Laverne being removed, had her [III-470] supervisory power taken from her by Mr. Link, that she had made a statement to an alderman, member of the Board of Aldermen, about allegations concerning Mr. Link?

A. That's kind of a long question, counsel.

Q. Yes, it is.

A. I'm going to try to answer it briefly. Whether or not Ms. Belk had her position adjusted or whether or not she had a conversation with a councilman concerning the City Administrator, was not relevant to the questions that I was looking at, not directly relevant, because what I was looking at were allegations of sexual misconduct, potential – potentially engaged in City Hall, and that's what I was focusing my attention to. If there were other potential exposures for the City that arose during that period of time, it very definitely would have been relevant. But at the – if I had that information – again I'm not sure I had it, don't recall that I had it – it would have been weighed along with what else I had in terms of resolving. But my investigation was related to the allegations of potential sexual misconduct and liability on the part of the City for that alleged conduct.

Q. Okay. And what was – you've testified that your recommendation was that there were then problems at City Hall, right?

A. Yes.

Q. Okay. And how was that related to your investigation

* * *